NO. 90-1674

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

VICTOR D. DENENBURG AND SANDRA J. DENENBURG,
Petitioners

vs.

UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the rule, as confirmed by the Supreme Court in United States v. Boyle, 469 U.S. 241 (1985) -- that a taxpayer's reasonable reliance on the advice of his tax adviser that he need not file a return constitutes "reasonable cause" under Int. Rev. Code Sec. 6651(a) and thus prevents a late-filing penalty -- likewise applies to advice that the taxpayer need not timely file.[1/]

II. Whether an appellate court, in affirming a summary judgment, may refuse to accept the deposition testimony of the appellants' witness on the key question of fact.

[1/]The Fifth Circuit fully discussed this point and obviously leaned in favor of an affirmative answer. But it stopped short of deciding it in order to avoid a possible conflict with another circuit court (or courts). The court, in a shocking holding, decided this case on another ground which is totally indefensible on a summary-judgment appeal; it is the issue raised in the second "question presented" above.

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OPINIONS BELOW

The opinion of the District Court (S.D. Tex. 1990) is not officially reported. The opinion of the Fifth Circuit is reported at 920 F.2d 301 (5th Cir. 1991). Copies of both opinions and related orders are reprinted in the appendix.

STATEMENT OF JURISDICTION

The Fifth Circuit decision was entered January 4, 1991. On January 30, 1991, the Fifth Circuit denied our Petition for Rehearing.

The statutory provisions believed to confer jurisdiction are as follows: 28 U.S.C. §1331 (the federal-question statute) and 28 U.S.C. §1254 (review of decisions of the courts of appeals by writ of certiorari).

THE STATUTE INVOLVED AND THE APPLICABLE TREASURY REGULATION

Internal Revenue Code:
Section 6651(a)(1) --

> In case of failure . . . to file any return . . . on the date prescribed therefor . . ., unless it is shown that such failure is due to reasonable cause and not due to wilful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent of the aggregate.

Treasury Income Tax Regulations:
26 C.F.R. §301.6651-1(c)(1) --

> (c) Showing of reasonable cause. (1) . . . If the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time, then the delay is due to a reasonable cause. . . .

STATEMENT OF THE CASE

The petitioners ("taxpayers"), Victor D. and Sandra J. Denenburg, Plaintiffs-Appellants below, are husband and wife. References to the "taxpayer" are to Mr. Denenburg.

The petitioners' complaint presented two causes of action. The first was whether they had reasonable cause for the late filing of their federal income tax return for 1978. Their second cause of action presented the same issue as to their 1979 return.

The government presented essentially no evidence of its own in the district court, and filed no controverting affidavit. Most of the evidence was in the form of the depositions of the taxpayer's C.P.A., F. Jerome Sweeney, and the taxpayer, Victor Denenburg. The evidence showed:

Reason for Delayed Filing:
A Major Unresolved Problem

Since about 1972 Victor Denenburg and his two brothers had owned and operated a corporation known as David Rents, Inc., which was engaged in the business of equipment rental. In 1978 the brothers were not getting along and Mr. Denenburg tried to resolve their differences by arranging to have his brothers' shares acquired by the corporation.

The acquisition of his brothers' stock occurred in 1978. Tax problems arose from the fact that the final signed agreements, unlike previous drafts, appeared to cast the transaction in the form of a purchase by Mr. Denenburg rather than by the corporation as he had intended and understood. (Either way, from that point forward, with his brothers having been bought out Mr. Denenburg was the sole owner.)

The corporation's records reflected the transaction as a stock redemption, and it was so reported in the corporation's 1978 return.

Corporate funds were used in acquiring the brothers' stock. Therefore, there would be substantially different tax treatment if Mr. Denenburg, rather than the corporation, were to be deemed the purchaser. A corporate stock redemption would have had no tax effect on the taxpayer individually. But if the purchase were deemed to have been made by Mr. Denenburg acting for himself (rather than as agent for the corporation), the use of corporate funds to acquire the stock would constitute "constructive dividends" to Mr. Denenburg. The result would be a very large increase in the Denenburgs' personal income tax liability.[2/]

[2/]This was not the only tax issue hinging on a determination of who was the purchaser. The purchase agreement also provided for payments for ten years to the taxpayer's brothers for their covenants not to compete. The consideration allocated to the covenants was $600,000. To the extent that all or any part of the

[ftnt. contd.]

Following his accountants' advice, Mr. Denenburg began long-drawn-out negotiations with his brothers in an attempt to persuade them to agree to amend the stock-purchase documents to clarify that the corporation (not he) was the purchaser.

However, in spite of Mr. Denenburg's attempts, over many months, to obtain such clarifying amendments, the issue remained unresolved. As to each tax year involved, there was evidence (and none to the contrary) that the reason for the delayed filing was the C.P.A.'s advice that it was not necessary to

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2/Contd....

consideration for the non-competition covenants might be reallocated by the IRS from the corporation (as payor) to Mr. Denenburg individually, and if then re-characterized as additional consideration paid for the stock (as part but not all of it was in the final settlement with the IRS), such would also constitute "constructive dividends" to Mr. and Mrs. Denenburg.

timely file, under these circumstances. Here is what the evidence showed:

The C.P.A.'s advice to delay the 1978 return. On his deposition, the taxpayer's C.P.A. (Mr. Sweeney) testified as follows in answer to what the Fifth Circuit called "the key question":

> Q Did you ever advise Mr. Denenburg with respect to his 1978 return that it was not necessary to file the return on time for some reason?
>
> A I am certain that I said that, and I think it was conveyed to him, that because of the substantial variation in the way the document was written with the way that the books were maintained at the corporation, that to file a return that was materially -- and we knew it to be incorrect -- was certainly not what we would as a firm propose to do. [Emphasis added.]

Consistently with his accountants' advice, Mr. Denenburg felt "if we couldn't do the return properly, it would be better to hold off until we got the issue resolved." Mr. Denenburg relied on his accountants'

professional opinion and advice in making this decision.[3/]

The district court denied the taxpayers' motion for summary judgment and granted the government's motion for summary judgment. The district court held that, as a matter of law, the taxpayers' failure to timely file their income tax return for each year was not due to "reasonable cause" under Section 6651(a)(1) of the Int. Rev. Code. The Fifth Circuit affirmed.

[3/]As to each year's return, the taxpayers' accountants had obtained extensions to the last extendable due date, October 15 of the subsequent year. Their 1978 return, which thus was due October 15, 1979, after first having been filed without their signatures on November 14, 1980, was filed with their signatures on December 15, 1980. Their 1979 return, which was due October 15, 1980, was filed on May 19, 1981. The IRS assessed late-filing penalties of $14,153.77 for 1978 and $43,157.74 for 1979, under Int. Rev. Code Sec. 6651(a)(1). The taxpayers paid the assessed penalties plus interest on June 29, 1984, in amounts totalling $26,353.30 for 1978 and $76,665.24 for 1979. In October 1984 the taxpayers filed a claim for refund for each year, and subsequently filed this suit for refund.

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

The district court had jurisdiction of this case under 28 U.S.C. §1346(a)(1).

ARGUMENT -- REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD CLARIFY, IN A BRIEF PER CURIAM DECISION, THAT ONE OF ITS "BRIGHT LINE" PRONOUNCEMENTS IN UNITED STATES V. BOYLE, 469 U.S. 241 (1985) -- THAT A TAXPAYER'S REASONABLE RELIANCE ON THE ADVICE OF HIS TAX ADVISER NOT TO FILE A RETURN CONSTITUTES "REASONABLE CAUSE" -- APPLIES NO LESS TO ADVICE NOT TO TIMELY FILE.

II.

THIS COURT SHOULD STRIKE DOWN, AGAIN IN A PER CURIAM DECISION, THE FIFTH CIRCUIT'S SHOCKING HOLDING THAT IT NEED NOT ACCEPT, ON THE TAXPAYERS' APPEAL FROM A SUMMARY JUDGMENT, THEIR C.P.A.'S DEPOSITION TESTIMONY ON THE KEY QUESTION.

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I.

THIS COURT SHOULD CLARIFY, IN A BRIEF PER CURIAM DECISION, THAT ONE OF ITS "BRIGHT LINE" PRONOUNCEMENTS IN UNITED STATES V. BOYLE, 469 U.S. 241 (1985) -- THAT A TAXPAYER'S REASONABLE RELIANCE ON THE ADVICE OF HIS TAX ADVISER NOT TO FILE A RETURN CONSTITUTES "REASONABLE CAUSE" -- APPLIES NO LESS TO ADVICE NOT TO TIMELY FILE.

In the first part of Part III ("DISCUSSION") of its opinion, the Fifth Circuit discussed, in scholarly fashion (citing decisions interpreting Boyle, supra), the question of whether advice not to timely file can constitute "reasonable cause" just as advice not to file at all can, as follows:

> The government, in its brief to this court and in oral argument, acknowledged that a taxpayer should not be penalized when failure to file his return by the due date results from circumstances beyond his control, citing Boyle, 469 U.S. at 248 n. 6, 105 S.Ct. at 691 n. 65 and Roberts, 860 F.2d at 1241. But in his oral argument to this court counsel for the government insisted that under no circumstances should professional advice of an accountant or lawyer relate to a taxpayer's inability to file returns in a timely manner and, accordingly, that such advice can never be the basis for applying the "reasonable cause" exception to I.R.C. § 6651. . . .

Neither the Taxpayer nor the government has directed us to a Fifth Circuit case squarely on point, and we are aware of none. Each case cited to this court by the Taxpayer or the government or both falls into one of four categories:

[The Fifth Circuit then discussed four categories of decisions, ending with category (4), as follows:]

(4) The taxpayer's reliance on the advice of his accountant or tax attorney that no return is due does constitute "reasonable cause" for delay.

Accepting, in arguendo, the Taxpayer's version of the facts in this case, it would clearly be distinguishable from the cases in the first three categories. And, while it would closely resemble the cases in the fourth category, the instant case may be distinguishable even from those -- as the government contends. . . .

Indeed, the Boyle court distinguished the case before it (category 1) from cases in category 4 by noting that "[t]his case is not one in which a taxpayer has relied on the erroneous advice of counsel concerning a question of law." Boyle, 469 U.S. at 250, 105 S.Ct. at 692 (citing category 4 cases as examples of justifiable reliance on expert advice about a question of law). The rationale for treating a category 4 case as constituting "reasonable cause" for delay is that "it is reasonable for the taxpayer to rely on the substantive advice of the professional" that it is unnecessary to file a return because "[r]equiring the taxpayer to confirm

independently that advice would 'nullify the very purpose of seeking the advice of a presumed expert in the first place.'" Jackson v. Commissioner, 864 F.2d 1521, 1527 (10th Cir. 1989) (quoting Boyle, 469 U.S. at 251, 105 S.Ct. 692).

Thus, just as cases in the fourth category involve questions of tax law about whether taxpayers must file returns at all, it follows in the instant case that whether the Taxpayer's difficulty in resolving the discrepancy in the stock purchase agreement constituted "reasonable cause" for delay under I.R.C. § 6651(a)(1) may well have involved questions of tax law about which the Taxpayer might justifiably rely on the CPA for advice. [Fifth Circuit's footnote 8 omitted.]

This conclusion is consistent with Boyle but would appear to conflict with the post-Boyle holding in Ballard v. Commissioner, 854 F.2d 185, 187 (7th Cir. 1988). In Ballard the Seventh Circuit seems to have afforded Boyle an overly broad interpretation, construing it to hold that "a taxpayer who does not file any return on the advice of his attorney has shown 'reasonable cause' but a taxpayer who has been advised that a late filing will result in no penalty had not." We read Boyle's holding more narrowly, simply that the "failure to make a timely filing of a tax return is not excused by the taxpayer's reliance on an agent" to make the filing for him. Boyle, 469 U.S. at 252, 105 S.Ct. at 693. Under our reading, Boyle did not, as read by the Seventh Circuit, decide whether the failure to file a return timely can be excused by the taxpayer's reliance on

> the advice of an expert about a question of law that, for example, "reasonable cause" for delay does exist. Indeed, on at least two occasions, the Eighth Circuit has left open the possibility that a taxpayer's reliance on the advice of counsel that "reasonable cause" for delay exists might itself constitute "reasonable cause."
>
> If this court now were to make a pronouncement either (a) that under no circumstances can advice from an accountant or an attorney constitute reasonable cause for late filing when the taxpayer is aware that a return must be filed and is aware of the deadline, or, (b) that under a given set of facts such advice could constitute reasonable cause, we might unwittingly create a conflict with one or more other circuits and, more importantly, would be doing so in obiter dictum. Doing that in this case is unnecessary. . . .

We suggest that, in a brief per curiam decision, this Court should resolve a possible conflict between the circuits by simply clarifying that its pronouncement in Boyle, that reasonable reliance on a tax adviser's advice constitutes "reasonable cause", applies to advice not to timely file, just as it does to advice not to file at all. Indeed, to us it seems almost laughable that one would contend

the contrary. If anything, considering that the purpose of the penalty is to discourage a perpetual failure to file, the law should shower greater disfavor on advice not to file at all rather than advice to merely postpone filing.

II.

THIS COURT SHOULD STRIKE DOWN, AGAIN IN A PER CURIAM DECISION, THE FIFTH CIRCUIT'S SHOCKING HOLDING THAT IT NEED NOT ACCEPT, ON THE TAXPAYERS' APPEAL FROM A SUMMARY JUDGMENT, THEIR C.P.A.'S DEPOSITION TESTIMONY ON THE KEY QUESTION.

On this appeal from a summary judgment, the record shows that the petitioners' C.P.A. testified on his deposition, in answer to what the Fifth Circuit described as "the key question" (which will be set forth below), that he had advised the taxpayer that it was not necessary to timely file a return. "I am certain that I said that," the C.P.A. answered.

(The C.P.A.'s statement "I am certain that I said that" pertained to the return for 1978; he gave a similar answer to a similar question as to the 1979 return.)

In upholding a summary judgment in favor of the government, the Fifth Circuit refused to accept this uncomplicated deposition testimony, apparently disbelieving the C.P.A.[4/]

The "key question" to the C.P.A. was:

> Q Did you ever advise Mr. Denenburg with respect to his 1978 return that it was not necessary to file the return on time for some reason?

As stated above, the C.P.A. answered: "I am certain that I said that." The rest of the C.P.A.'s answer did not detract from this affirmation. At the very least, the C.P.A.'s answer was evidence from which the taxpayers were entitled to a favorable inference against the government's motion for summary judgment.

[4/]Although never flatly saying it rejected the C.P.A.'s testimony, the Fifth Circuit obviously did so. After quoting the C.P.A.'s answer, the court cast aspersions on it and obviously discarded it.

In short, since this was an appeal from a summary judgment, the Fifth Circuit's decision makes no sense. The Fifth Circuit correctly designated a question put to the C.P.A. as "the key question." Although the C.P.A. answered it squarely in the appellants' favor, the Fifth Circuit affirmed the summary judgment!

On the taxpayer's appeal from a summary judgment, the Fifth Circuit erred in refusing to accept his C.P.A.'s testimony on a material fact as F.R.C.P. 56(c) requires. The Fifth Circuit criticized and doubtless disbelieved the C.P.A.'s testimony, but credibility and weight are for the fact-finder and this case has not yet been tried on its facts, having been decided on a motion for summary judgment.

On an appeal from a summary judgment it is fundamental that the evidence (including all reasonable inferences therefrom) must be interpreted in the light most favorable to the appellant.

Basic summary-judgment law. The credibility of a witness is not a matter for the District Court on a motion for summary judgment -- nor for an appellate court on appeal from a summary judgment. On summary-judgment motions, and appeals from summary judgments, the evidence favoring the "non-movant", or the appellant, must be accepted. Additionally, all reasonable inferences therefrom must be drawn in the appellant's (or non-movant's) favor. The Fifth Circuit's decision is therefore contrary to the summary-judgment law as announced by this Court as well as in prior decisions of the Fifth Circuit, as set forth in footnote 5 below.[5/]

[5/]Basic summary-judgment law applicable here: Baton Rouge Bldg. & Constr. Trades Council v. Jacobs Constructors, Inc., 804 F.2d 879, 881 (5th Cir. 1986) (per curiam) (citing Southmark Properties v. Charles House Corp., 742 F.2d 862, 873 (5th Cir. 1984)). See also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

[ftnt. contd.]

It is necessary that this Court restore normality to summary-judgment decisions and

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These cases were so cited by the Fifth Circuit in this case. See also the following Fifth Circuit and Supreme Court decisions to a similar effect:

On one party's motion for summary judgment, the courts must accept any competent evidence presented by the opposing party as true. Leonard v. Dixie Well Service & Supply, Inc., 828 F.2d 291 (5th Cir. 1987).

Over fifty years ago, Judge Hutcheson stated some of the controlling principles in Whitaker v. Coleman, 115 F.2d 305, 306, 307 (5th Cir. 1940), as follows:

> The . . . [summary-judgment] procedure, valuable as it is for striking through sham claims and defences . . . , was not intended to, it cannot deprive a litigant of, or at all encroach upon, his right to a jury trial.
>
> To proceed to summary judgment it is not sufficient then that the judge may not credit testimony proffered on a tendered issue. It must appear that there is no substantial evidence on it, that is, either that the tendered evidence is in its nature too incredible to be accepted by reasonable minds, or that conceding its truth, it is without legal probative force. . . .

[ftnt. contd.]

appeals by reversing this aberration. This Court must bring the application of summary-judgment law back into conformity with its recent decisions in such cases as Celotex

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> Summary judgment procedure is not a . . . contrivance to take unwary litigants into its toils and deprive them of a trial. . . . Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists.

Almost four decades later, in Brunswick v. Vineberg, 370 F.2d 605, 612 (5th Cir. 1967), Judge Goldberg warned:

> Summary judgment is a lethal weapon, and courts must be mindful of its aims and targets and beware of overkill . . . .

See also Gray Tool Co. v. Humble Oil & Refining Co., 186 F.2d 365, 367 (5th Cir. 1951), cert. denied 341 U.S. 934 (1951); and New York Life Ins. Co. v. Baum, 707 F.2d 870, 871 (5th Cir. 1983).

[ftnt. contd.]

Corp. v. Catrett, 477 U.S. 317 (1986), and particularly Anderson v. Liberty Lobby, Inc., supra.

5/Contd....

Supreme Court cases:

In Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986), supra, the Supreme Court said:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . . The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. . . . [T]he plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial. [Emphasis added.]

See also Bishop v. Wood, 426 U.S. 341, 344 (1976), and United States v. Diebold, 369 U.S. 654, 655 (1962).

CONCLUSION

For either or both of the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for a Writ of Certiorari have been served this 29th day of April, 1991, by United States Mail, postage prepaid, addressed to:

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JOHN A. BAILEY

APPENDIX A

Victor D. DENENBURG and wife,
Sandra J. Denenburg,
Plaintiffs-Appellants,

v.

UNITED STATES of America,
Defendant-Appellee.

No. 90-2257.

United States Court of Appeals,
Fifth Circuit.

Jan. 4, 1991.

Appeal from the United States District Court for the Southern District of Texas.

Before GARWOOD and WIENER, Circuit Judges, and VELA *, District Judge.

WIENER, Circuit Judge:

Victor D. Denenburg (Taxpayer), and his wife, Sandra J. Denenburg, plaintiffs-appellants, paid penalties imposed by the

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* District Judge of the Southern District of Texas, sitting by designation.

Internal Revenue Service (IRS), under the Internal Revenue Code of 1954 (I.R.C.) § 6651,[1] for late filing of personal income tax returns for 1978 and 1979, then filed this suit in district court seeking refund of those penalties. The government filed a motion for summary judgment which the district court granted after finding that the accounting advice relied on by the Taxpayer and his wife did not constitute "reasonable cause" under I.R.C. § 6651(a)(1)'s exception and thus did not excuse their failure to file their returns in a timely manner. The Taxpayers timely appealed. Agreeing with the district court's finding that "at no time were [the Taxpayers] told by [their accountant] that the returns need not be [timely] filed," we affirm.

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1. 26 U.S.C. § 6651.

I.

BACKGROUND

Taxpayer and two of his brothers owned all of the capital stock of a corporation engaged in the equipment rental business. The three brothers experienced differences of opinion in 1978, which the Taxpayer attempted to resolve by arranging for the corporation to redeem all shares held by the other two brothers. The stock purchase agreement, however, specified that the stock belonging to Taxpayer's brothers would be purchased by the Taxpayer. Nevertheless, payments for purchase of that stock were made with corporate funds and recorded on the books of the corporation as purchases of treasury stock, in accordance with the brothers' original understanding.

When Taxpayer's accountant (the CPA) became aware of the provisions of the stock purchase agreement and the way payments had been made and recorded on the books of the corporation, he was concerned that the

Taxpayer might be charged with receiving constructive dividends, thereby generating substantial "phantom" ordinary income for the Taxpayer. After the Taxpayer confirmed to the CPA that the original deal struck by the brothers was for the corporation to redeem his brothers' stock, and that only through inadvertence did the stock purchase agreement call for the Taxpayer to purchase that stock personally, the CPA advised the Taxpayer to get his brothers to correct the stock purchase agreement to reflect that the corporation was the true party purchaser. The CPA obtained the maximum extension for Taxpayer's 1978 return. As of the extended due date (October 15, 1979), however, the conflict between the wording of the purchase agreement and the way the transaction had been negotiated and booked remained unresolved due to the continuing ill will between the Taxpayer and his brothers.

The Taxpayer and his wife did not file their signed 1978 return until December 15,

1980, a year and two months after the extended deadline of October 15, 1979. Because the problem with the stock purchase agreement persisted, the CPA also obtained extensions for Taxpayer's 1979 return to October 15, 1980, but the 1979 return was not filed until May 19, 1981, approximately seven months late.

The IRS assessed penalties against the Taxpayer and his wife pursuant to I.R.C. § 6651(a)(1) -- $14,153.77 for 1978, and $43,157.74 for 1979 -- for failure to file returns for those years by their respective due dates as extended. The Taxpayer paid the assessed penalties and interest, then filed a claim for refund with the IRS, asserting that based on the exception in I.R.C. § 6651(a)(1), he and his wife had "reasonable cause" for failing to file their returns timely. The IRS denied the claim, and the Taxpayer and his wife filed this suit for refund in district court.

II.

DISTRICT COURT PROCEEDINGS

The refund suit was filed in November of 1987. Depositions of the Taxpayer and the CPA were taken in October of 1988. Early in 1989, each party filed a motion for summary judgment together with an affidavit and memorandum of authorities. In October, 1989, the district court entered its order granting summary judgment for the government. The Taxpayer then filed a motion for reconsideration pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. In January, 1990, the district court denied the Taxpayer's Rule 59(e) motion, after which a notice of appeal was timely filed on behalf of Taxpayer and his wife.

III.

DISCUSSION

This court reviews the grant of summary judgment motion de novo, using the same

criteria used by the district court in the first instance. Walker v. Sears, Roebuck & Co., 853 F.2d 355, 358 (5th Cir.1988). We "review the evidence and inferences to be drawn therefrom in the light most favorable to the non-moving party." Baton Rouge Bldg. & Constr. Trades Council v. Jacobs Constructors, Inc., 804 F.2d 879, 881 (5th Cir.1986) (per curiam) (citing Southmark Properties v. Charles House Corp., 742 F.2d 862, 873 (5th Cir.1984). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91

L.Ed.2d 202 (1986). "Material facts" are "facts that might affect the outcome of the suit under the governing law." Id.

Section 6651(a)(1) of the Internal Revenue Code specifies penalties for failure to file a tax return by the due date "unless it is shown that such failure is due to reasonable cause and not due to willful neglect."[2] Any "'cause for delinquency which appears to a person of ordinary prudence and intelligence as a reasonable cause for delay in filing a return . . . will be accepted as reasonable.'" United States v. Boyle, 469 U.S. 241, 245 n. 1, 105 S.Ct. 687, 689 n. 1, 83 L.Ed.2d 622, 627 n. 1 (1985) (quoting Internal Revenue Manual (CCH) § 4350,(24) ¶22.2(3) (Mar. 20, 1980)). To demonstrate "reasonable cause," a taxpayer must show that he exercised "ordinary business care and

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2. Willful neglect is not at issue in this case.

prudence." Treas. Reg. § 301.6651-1(c)(1) (as amended 1973). "[W]hether the elements that constitute 'reasonable cause' are present in a given situation is a question of fact, but what elements must be present to constitute 'reasonable cause' is a question of law." Roberts v. Commissioner, 860 F.2d 1235, 1241 (5th Cir.1988) (citing Boyle, 469 U.S. at 249 n. 8, 105 S.Ct. at 692 n. 8). On issues of fact, however, this court views the evidence in the light most favorable to the Taxpayer as nonmovant, bearing in mind that the Taxpayer and his wife bear the burden of proving that the failure to file timely resulted from "reasonable cause." See Roberts, 860 F.2d at 1241.

The government, in its brief to this court and in oral argument, acknowledged that a taxpayer should not be penalized when failure to file his return by the due date results from circumstances beyond his control, citing Boyle, 469 U.S. at 248 n. 6, 105 S.Ct.

at 691 n. 6 and Roberts, 860 F.2d at 1241. But in his oral argument to this court counsel for the government insisted that under no circumstances should professional advice of an accountant or lawyer relate to a taxpayer's inability to file returns in a timely manner and, accordingly, that such advice can never be the basis for applying the "reasonable cause" exception to I.R.C. § 6651. Nonetheless, in its brief to this court, the government stated unequivocally that reliance on professional advice may constitute reasonable cause for late filing.[3]

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3. The logic of the government's brief is sometimes difficult to follow. On pages 7 and 8, it urges that the Taxpayer must be "unable" to file timely, in the physical or geographical sense, due to circumstances beyond his control. On page 9 the government posits that a taxpayer cannot delegate responsibility for timely filing to his accountant or attorney. Then, on page 10 of the brief, appears the statement, "That is not to say that reliance on professional advice may not constitute reasonable cause for late filing." (emphasis added)

Neither the Taxpayer nor the government has directed us to a Fifth Circuit case squarely on point, and we are aware of none. Each case cited to this court by the Taxpayer or the government or both falls into one of four categories:

(1) The taxpayer's reliance on an agent to comply with a fixed and unambiguous statutory deadline for filing returns does not

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Mysteriously, that is the lead sentence of a paragraph devoted to distinguishing between late filing and not filing, in which the government concludes (in direct conflict with the opening sentence) that "Because it is undisputed that taxpayers were required to file their 1978 and 1979 returns in the case at bar, and knew of their obligation to file, that rule [reliance on professional advice that a return need not be filed at all] does not apply here." Next, from the bottom of page 10 to the top of page 12, the government's brief discusses splits in the circuits on cases in which the taxpayer was unaware of the due date. Finally, on pages 12 and 13, the government submits that other circuits "which have considered this particular question in light of Boyle have held that such advice does not constitute reasonable cause."

constitute "reasonable cause for delay."[4]

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4. See, e.g., Boyle, 469 U.S. at 251, 105 S.Ct. at 692; Alton Ob-Gyn, Ltd. v. United States, 789 F.2d 515, 516 (7th Cir.1986) (interpreting Boyle as meaning that the failure of an agent to timely file tax returns does not constitute "reasonable cause"); Crouse v. United States, 711 F.2d 102, 104 (8th Cir.1983) (noting that taxpayers could not rely on attorney to timely file return when the taxpayers knew the due date); Laney v. Commissioner, 674 F.2d 342, 350 (5th Cir. Unit A Apr. 1982) (holding that the taxpayers could not successfully shift the blame for the late filing of the return to their accountant by arguing that they satisfied the requirements of I.R.C. § 6651(a)(1) by urging the accountant to file on time and that they cannot be blamed if he failed to do so); Fleming v. United States, 648 F.2d 1122, 1125 (7th Cir.1981) (holding that a taxpayer cannot blindly rely upon his agent to timely file a return or an extension); Millette & Associates, Inc. v. Commissioner, 594 F.2d 121, 124-25 (5th Cir.) (holding that the taxpayer cannot delegate the duty to timely file a return to an agent), cert. denied, 444 U.S. 899, 100 S.Ct. 207, 62 L.Ed.2d 135 (1979); Sanderling, Inc. v. Commissioner, 571 F.2d 174, 177 (3d Cir.1978) (noting that if the due date is known to the taxpayer, the taxpayer cannot blame the failure to timely file on an agent); United States v. Kroll, 547 F.2d 393, 396 (7th Cir.1977) (holding that the failure of the taxpayer's agent to present him with the return for his signature before the filing deadline "must put him on notice that reliance on the attorney or accountant is not an exercise of ordinary business care and prudence").

(2) The taxpayer's reliance on his agent to ascertain the correct filing date for returns does not constitute "reasonable cause" for delay.[5]

(3) The taxpayer's reliance on the advice of his agent that he need not meet a return filing deadline (or file a return at all) because no taxes are due does not constitute "reasonable cause" for delay.[6]

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5. See, e.g., Estate of Kerber v. United States, 717 F.2d 454, 455-56 (8th Cir.1983), cert. denied sub nom. Doring v. United States, 469 U.S. 1188, 105 S.Ct. 955, 83 L.Ed.2d 962 (1985); Smith v. United States, 702 F.2d 741, 743 (8th Cir.1983) (executor had nondelegable duty to file a timely return, and reliance on the mistaken advice of a tax advisor as to the due date is not sufficient to constitute "reasonable cause" for failing to fulfill that duty (following Boeving v. United States, 650 F.2d 493, 495 (8th Cir.1981) and Estate of Lillehei v. Commissioner, 638 F.2d 65, 66 (8th Cir.1981))).

6. See, e.g., Jackson v. Commissioner, 864 F.2d 1521, 1527 (10th Cir.1989) (holding that the taxpayer must bear the risk of an expert's advice concerning the amount of tax owed when the taxpayer fails to comply with

(4) The taxpayer's reliance on the advice of his accountant or tax attorney that no return is due does constitute "reasonable cause" for delay.[7]

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a known duty to file a return); Ballard v. Commissioner, 854 F.2d 185, 189 (7th Cir.1988) (holding that the taxpayer's reliance on the advice of her attorney that no penalty would result from a late filing since she would end up not owing any taxes, did not constitute "reasonable cause" for delay); see also Rubber Research, Inc. v. Commissioner, 422 F.2d 1402, 1407 (8th Cir.1970) (holding that an assertion on appeal that a company that failed to file a return one year had received legal advice that no tax was due did not amount to a showing of "reasonable cause").

7. See, e.g., Boyle, 469 U.S. at 250, 105 S.Ct. at 692; Fleming v. United States, 648 F.2d 1122, 1129 (7th Cir.1981); United States v. Kroll, 547 F.2d 393, 395-96 (7th Cir.1977); Commissioner v. American Ass'n of Eng'rs Employment, Inc., 204 F.2d 19, 21 (7th Cir.1953); Burton Swartz Land Corp. v. Commissioner, 198 F.2d 558, 560 (5th Cir.1952); Haywood Lumber & Mining Co. v. Commissioner, 178 F.2d 769 (2d Cir.1950); Orient Inv. & Fin. Co. v. Commissioner, 166 F.2d 601 (D.C.Cir. 1948); Hatfried, Inc. v. Commissioner, 162 F.2d 628 (3d Cir.1947); Estate of DiPalma v. Commissioner, 71 T.C. 324, 327 (1978).

Accepting, in arguendo, the Taxpayer's version of the facts in this case, it would clearly be distinguishable from the cases in the first three categories. And, while it would closely resemble the cases in the fourth category, the instant case may be distinguishable even from those -- as the government contends. The rationale of the holdings in the cases of the first three categories is that "one does not have to be a tax expert to know that tax returns have fixed filing dates and that taxes must be paid when they are due.... Reliance by a lay person on [an expert tax advisor] cannot function as a substitute for compliance with an unambiguous statute." Boyle, 469 U.S. at 251, 105 S.Ct. at 693. Fixed statutory deadlines for filing tax returns, regardless of whether any taxes are due, are unambiguous. "Reasonable cause" is used in I.R.C. § 6651(a)(1) as a term of art. It is certainly the kind of wording that for all but the most sophisticated taxpayers

requires interpretation by an expert tax advisor.

Indeed, the Boyle court distinguished the case before it (category 1) from cases in category 4 by noting that "[t]his case is not one in which a taxpayer has relied on the erroneous advice of counsel concerning a question of law." Boyle, 469 U.S. at 250, 105 S.Ct. at 692 (citing category 4 cases as examples of justifiable reliance on expert advice about a question of law). The rationale for treating a category 4 case as constituting "reasonable cause" for delay is that "it is reasonable for the taxpayer to rely on the substantive advice of the professional" that it is unnecessary to file a return because "[r]equiring the taxpayer to confirm independently that advice would 'nullify the very purpose of seeking the advice of a presumed expert in the first place.'" Jackson v. Commissioner, 864 F.2d

1521, 1527 (10th Cir.1989) (quoting Boyle, 469 U.S. at 251, 105 S.Ct. 692).

Thus, just as cases in the fourth category involve questions of tax law about whether taxpayers must file returns at all, it follows in the instant case that whether the Taxpayer's difficulty in resolving the discrepancy in the stock purchase agreement constituted "reasonable cause" for delay under I.R.C. § 6651(a)(1) may well have involved questions of tax law about which the Taxpayer might justifiably rely on the CPA for advice.[8]

This conclusion is consistent with Boyle but would appear to conflict with the post-Boyle holding in Ballard v. Commissioner, 854 F.2d 185, 187 (7th Cir.1988). In Ballard the Seventh Circuit seems to have afforded Boyle

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8. Whether accurate tax returns for Taxpayer could have been timely filed was not a simple question. Complex and difficult calculations were required in order to produce an accurate tax return.

an overly broad interpretation, construing it to hold that "a taxpayer who does not file any return on the advice of his attorney has shown 'reasonable cause' but a taxpayer who has been advised that a late filing will result in no penalty had not." We read Boyle's holding more narrowly, simply that the "failure to make a timely filing of a tax return is not excused by the taxpayer's reliance on an agent" to make the filing for him. Boyle, 469 U.S. at 252, 105 S.Ct. at 693. Under our reading, Boyle did not, as read by the Seventh Circuit, decide whether the failure to file a return timely can be excused by the taxpayer's reliance on the advice of an expert about a question of law that, for example, "reasonable cause" for delay does exist. Indeed, on at least two occasions, the Eighth Circuit has left open the possibility that a taxpayer's reliance on the advice of counsel that "reasonable cause" for delay exists might

itself constitute "reasonable cause."[9]

If this court now were to make a pronouncement either (a) that under no circumstances can advice from an accountant or an attorney constitute reasonable cause for late filing when the taxpayer is aware that a return must be filed and is aware of the deadline, or, () that under a given set of facts such advice could constitute reasonable cause, we might unwittingly create a conflict with one or more other circuits and, more importantly, would be doing so in obiter dictum. Doing that in this case is unnecessary. Even if we assume as urged by the Taxpayer that the rule is or should be that a

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9. See Estate of Kerber v. United States, 717 F.2d 454, 455 (8th Cir.1983), cert. denied sub. nom. Doring v. United States, 469 U.S. 1188, 105 S.Ct. 955, 83 L.Ed.2d 962 (1985); Smith v. United States, 702 F.2d 741, 743 (8th Cir.1983).

taxpayer, who is told by a properly credentialed legal or accounting advisor that as a matter of tax law a taxpayer's return need not be filed by a due date known to the taxpayer, has reasonable cause not to file timely, we would still be required to affirm the holding of the district court.

The Taxpayer contends that he received such advice: that the CPA, who was at one time the tax partner in charge of the Houston office of the fourteenth largest accounting firm in the nation, advised the Taxpayer that as a matter of tax law and irrespective of the expiration of the ultimate extension dates for the returns in question, it was neither necessary nor proper for the Taxpayer to file those returns until the stock purchase agreement could be amended to confirm with the realities of the transaction. The district court found otherwise, and we agree. Neither the Taxpayer's deposition nor the CPA's deposition or affidavit provides support for

the Taxpayer's contention even when viewed, as it must be, in the light most favorable to the Taxpayer.

The Taxpayer's deposition reflects that he depended on his accountants to take care of extensions and of meeting deadlines. Doing that constitutes an unauthorized delegation of the Taxpayer's responsibility, not reliance on advice. When qusetioned about receiving such advice, the Taxpayer responded that he did not recall receiving any advice from the CPA or any other accountant to the effect it was not necessary to file the 1978 return on time. In fact, the Taxpayer said, "We all know that you are supposed to file a return within a timely manner. It was just the fact that if we couldn't do the return properly, it would be better to hold off until we got the issue resolved." At another point when the Taxpayer was asked, "Do you recall your CPA's ever informing you of the consequence of late filing?" he answered:

> "You know, I am sure that might have come up; I'm not positive about that. You know, back in '79, we were in the middle of a construction project. I knew that I had some offsets that would be coming to me, construction interests and so forth; and I knew that I -- I felt that we wouldn't have to pay taxes. And that was certainly another reason that I wasn't that concerned. It was a rather large project and I thought it would offset this completely.
>
> "Not that that's any justification for it by any means. It wasn't the -- it wasn't the reason, it was really that -- trying to get those papers amended. But I felt secure in my mind that we wouldn't have any taxes owed...."

When, in the same colloquy, the Taxpayer was asked, "But I gather, then, you didn't receive advice from [the CPA] or his firm that because no taxes would be owed, you didn't have to file the return on time?" he responded negatively.

More damaging to the Taxpayer's contention is the deposition testimony of the CPA. When asked what advice he gave the Taxpayer before passage of the October 15, 1979, deadline concerning the need to file on or before the deadline date, the CPA responded,

"Well, I think that I had not direct contact with him at that time....I don't recall that I had any personal contact with him. But at that stage it was nothing more than from my point of view of waiting to hear that the corrected or amended [sales contract] had been received."

When the CPA was asked the key question, "Did you ever advise [the Taxpayer] with respect to his 1978 return that it was not necessary to file the return on time for some reason?" the CPA's response was an artful example of neither cooking his client's goose nor confessing to professional negligence or worse: "I am certain that I said that, and I think it was conveyed to him, that because of the substantial variation in the way the document was written with the way that the books were maintained at the corporation, that to file a return that was materially -- and we knew it to be incorrect -- was not certainly not what we as a firm would propose to do."

At another point when asked, "Did you ever discuss with [the Taxpayer] the exception to the failure to file timely penalty for reasonable cause and what was reasonable cause?", the CPA responded, "I know that we had some discussions on that. I don't know what they were specifically. I think that we discussed the reasonable cause issue with [the IRS auditor].[10] And I think it was her statement that cause us to go ahead and

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10. In September of 1980, shortly before the October 15, 1980, filing deadline for the 1979 return, the IRS initiated an audit of the corporation's 1978 return. The IRS agent then extended the scope of the audit to include the Taxpayer's personal returns for 1978 and 1979. Under the urging and insistence of the IRS auditor, the Taxpayer's CPA prepared and submitted tentative returns for 1978 and 1979.

    The Taxpayer argued in its brief that his CPA contemplated filing both the 1978 and 1979 returns in October of 1980, but that "the turmoil of the newly-commenced IRS audit ... reasonably justified postponing the filing of these returns in the CPA's professional opinion.

prepare, as I said, tentative returns. I wasn't professional satisfied that was the right thing to do." The CPA also testified that, in response to the Taxpayer's telephone calls about filing returns, the CPA had responded, "Well, I won't file it unless those amended documents are there." Later, in response to a question about his own awareness of any provisions that excuse the late filing penalty if there is reasonable cause for late filing, the CPA responded, "I am not aware of that. I don't know what 'reasonable cause'

The onset of an audit in September of 1980 could not have constituted reasonable cause for delay in filing the 1978 return, which by extension had been due on October 15, 1979, almost one year before the audit commenced. Furthermore, we cannot know when the Taxpayer would have actually filed the returns had the IRS auditor not insisted that the returns be filed. And, after examining the record, we find no indication whatsoever that the CPA advised the Taxpayer that, as a matter of tax law, it was not necessary that the returns be timely filed because the IRS audit constituted reasonable cause for delay.

would be described to be. I think that we had reasonable cause not to file this -- not to prepare this return." (emphasis added)

Like his deposition testimony, the CPA's affidavit gallantly straddles the fence in a vain effort to support his client's failure to file returns timely, without at the same time inculpating the CPA's firm or perjuring himself.

The inescapable conclusion from careful readings of the depositions and affidavits is that the CPA never clearly and expressly advised the Taxpayer that, as a matter of tax law, it was not necessary that the returns be timely filed despite knowledge of the final, unextendable deadlines. Rather, the picture emerges of (1) an accounting firm unwilling to prepare and sign returns which were not supported by business documentation and which did not accurately reflect the true substance of the transaction; and (2) a taxpayer willing to miss known filing deadlines because his

accountants were unwilling to prepare returns acceptable to the Taxpayer who was himself incapable of preparing them on his own.

Those conclusions are admittedly inferential. A fact that is not inferential, however, but is abundantly clear from the summary judgment evidence is that the Taxpayer has not and cannot demonstrate reliance on tax law advice from the CPA sufficient to constitute reasonable cause for failure to file the subject return timely, even if we assume, without holding, that such advice could constitute "reasonable cause" for purposes of the exception contained in I.R.C. § 6651(a)(1).

For the foregoing reasons the judgment of the district court is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

VICTOR D. DENENBURG and SANDRA J. DENENBURG,	)	[ENTERED OCT. 5, 1989]
Plaintiffs,	)	
v.	)	CIVIL ACTION NO. H-87-3547
UNITED STATES OF AMERICA,	)	
Defendant.	)	

ORDER

Pending before the Court are the parties' cross-motions for summary judgment (Document #8 and #11). Having considered the motions, the responses, the memoranda in support and in opposition, and the applicable law, the Court is of the opinion that defendant's motion should be granted and plaintiffs' motion should be denied.

Plaintiffs filed this lawsuit seeking to recover late filing penalties, together with interest thereon, assessed by the Internal Revenue Service ("IRS") after the plaintiffs

failed to timely file their 1978 and 1979 income tax returns.

Plaintiffs income tax return for taxable year 1978, after extensions, was due October 15, 1979. It was filed on November 14, 1980, a year later. The plaintiffs' 1979 income tax return was also late. It was due, after extensions, on October 15, 1980, but was not filed until May 19, 1981.

Because their returns were late, plaintiffs were assessed penalties by the Internal Revenue Service in the amounts of $14,153.77 for 1978 and $43,157.74 for 1979. Plaintiffs paid the penalties, plus interest, and filed a claim for refund. The refund claim was denied. Thereafter, plaintiffs instituted this suit contending that the penalty was unjustified because their failure to file the return on time was "due to reasonable cause."

Defendant now moves for summary judgment on the ground that plaintiffs failed to

establish reasonable cause as a matter of law as required by section 6651(a)(1), of the Internal Revenue Code, and thus, it is entitled to judgment. Plaintiffs also move for summary judgment claiming that it was impossible for them to file their return on time, and therefore, they have established "reasonable cause" pursuant to section 6651(a)(1), as a matter of law, and thus, they are entitled to judgment.

Therefore, the sole issue for this Court to address is whether plaintiffs had reasonable cause, as a matter of law, for failing to timely file their income tax returns for taxable years 1978 and 1979.

The Internal Revenue Code Section 6651(a)(1) reads in pertinent part that:

> In case of failure . . . to file any return . . . on the date prescribed therefor . . ., **unless it is shown that such failure is due to reasonable cause and not due to wilful neglect**, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is not more than 1 month, with an

> additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent of the aggregate.

26 U.S.C. § 6651(a)(1).

To escape the penalty for filing late returns, plaintiffs have the heavy burden of proving (1) that the failure to file the return did not result from wilful neglect, and (2) that the failure was due to reasonable cause. United States v. Boyle, 469 U.S. 241, 245, 105 S.Ct. 687, 689-90 (1985). Wilful neglect is not at issue in this case. Reasonable cause, while not defined in the Code, requires plaintiffs to demonstrate that they exercised "ordinary business care and prudence" but nevertheless were "unable to file the return within the prescribed time." 26 CFR § 301.6651(a)(1) (1984).

The Supreme Court has held that reasonable cause is established when a taxpayer reasonably relies on the advice of counsel that a tax return need not be filed, even

though that advice is later found to be erroneous. United States v. Boyle, 469 U.S. 249, 252, 105 S.Ct. 687, 693 (1985). They reasoned that ordinary business care and prudence does not require a taxpayer "to seek a 'second opinion,' or to try to monitor counsel on the provisions of the Code himself." Id. at 251, 105 S.Ct. at 692-693. To hold otherwise, the Court said, "would nullify the very purpose of seeking the advice of a presumed expert . . . ." Id., 105 S.Ct. at 693. However, the Supreme Court has held that "[i]t takes no special training or effort [for a taxpayer] to ascertain a deadline and make sure that it is met." Id. at 252, 105 S.Ct. at 693.

Based on the reasons set out below, the Court is of the opinion that the defendant's motion for summary judgment should be granted.

Summary judgment is authorized if the movant establishes that there is no genuine dispute about any material fact and that as a

matter of law he is entitled to judgment. Fed. R. Civ. P. 56(c). The United States has clarified the burden that a party must meet to obtain a summary judgment under Rule 56 of the Federal Rules of Civil Procedure. In Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986), the Supreme Court stated that "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322, 106 S.Ct. at 2552 (emphasis supplied). The moving party, of course, must shoulder "the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the 'pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any,' which [he] believes demonstrate the absence of

a genuine issue of material fact." Id. at 323, 106 S.Ct. at 2553.

In determining whether a fact issue exists in this case, the Court is "guided by the Supreme Court's declaration that whether the elements that constitute 'reasonable cause' are present in a given situation is a question of fact, but what elements must be present to constitute 'reasonable cause' is a question of law." Roberts v. C.I.R., 860 F.2d 1235, 1241 (5th Cir. 1988).

Plaintiffs contend that their 1978 tax return was filed late because their accountant, F. Jerome Sweeney, discovered a discrepancy in their characterization of a corporate transaction, which would result in personal tax liability if uncorrected.[1]

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[1]From 1972-1977, Mr. Denenburg and his two brothers owned a corporation called David Rents, Inc. In 1978, the brothers were not getting along so Mr. Denenburg decided to arrange to have his brothers' interests acquired by the corporation.

Victor Denenburg asserts that he attempted to correct the discrepancy but was unable to do so before the filing deadline. See Denenburg Deposition at 9. Mr. Sweeney advised plaintiffs that an extension in which to file the 1978 tax returns would expire October 15, 1979. See Sweeney Deposition at 5-22. Mr. Denenburg in his deposition acknowledged the fact that everyone knows that tax returns must be filed timely. Denenburg Deposition at 14. Nevertheless, plaintiffs failed to file the return until almost a year later.

The accounting records and written agreements of the transaction were not consistent. The corporate books reflected the transaction as a redemption of stock. The written agreement between the brothers indicated that the transaction was a purchase by Mr. Denenburg of his brothers' stock interest.

The discrepancy in the characterization of the transaction was discovered in September 1979 by Mr. Sweeney. The discrepancy was significant in that a redemption of stock by the corporation has no tax effects to Mr. Denenburg, while the purchase of stock using corporate funds would cause constructive dividends to Mr. Denenburg and significant taxable income. See Defendant's Memorandum in Support of Summary Judgment.

Plaintiffs further assert that their 1979 tax return was filed late because of an IRS audit that was ongoing since September of 1979.

In 1980, the IRS began an audit of the corporate income tax for 1978. Within a few months, the IRS audit extended to the Denenburgs' personal returns. Plaintiffs assert that the accountants determined that the filing of a proper or accurate return by the due date would be impossible. They contend that the IRS has recognized impossibility as constituting good cause for a late filing, citing United States v. Boyle in support. The Plaintiffs' reliance on Boyle is misplaced.

In Boyle the United States Supreme Court refused to refund penalties paid by a taxpayer for the mistake of his attorney on the ground that the taxpayer knew of the tax deadline and should have insured that the tax return was filed on time. Boyle was appointed executor

of his mother's estate. He retained Keyser to serve as attorney for the estate. Keyser advised Boyle that he needed to file a federal estate tax return, but he failed to mention the filing deadline to Boyle. Boyle cooperated fully with his attorney and obtained for him "all the relevant information and records." Id. at 243, 105 S.Ct. 688. Keyser advised Boyle that the return would be filed on time. The deadline came and passed. When Boyle called Keyser to check on the status of the return, he was told that the deadline had passed. Within two days Boyle had met with Keyser and the return was filed. Nevertheless, Boyle was penalized for his late filing, a decision upheld on appeal.

The result in Boyle was harsh considering the fact that the taxpayer cooperated fully with his lawyer and it was the lawyer who failed to file the returns on time. Here, Mr. Denenburg was told by Mr. Sweeney that the corporate agreement between his brothers had

to show that the stock was not purchased by Mr. Denenburg, but instead, was a redemption of stock. Without the corrected documents, Mr. Sweeney said, the tax returns for 1978 and 1979 would be materially incorrect. It was incumbent upon Mr. Denenburg to get the corrected documents. A dispute with his brothers does not constitute an impossibility to file tax returns. Plaintiffs were aware of the filing deadline, it was, therefore, they responsibility to file the returns on time. Their claim that Mr. Sweeney refused to file an incorrect return does not relieve them of the responsibility of filing a return, and thus, does not constitute reasonable cause as a matter of law.

The Court recognizes, a did the Supreme Court did in Boyle, that reliance on the advise of counsel that a tax return does not need to be filed constitutes reasonable cause. But, at no time were the plaintiffs told by Mr. Sweeney that the returns need not be

filed. Denenburg Deposition at 14. Plaintiffs did not have to be tax experts to know that tax returns have fixed filing dates and that taxes must be paid when due. Therefore, plaintiffs reliance on Mr. Sweeney's reluctance to file an improper return as a basis for establishing reasonable cause is insufficient as a matter of law.

Nor can the plaintiffs rely on the IRS audit or the IRS agent's investigation as a basis since the IRS agent never told Mr. Denenburg or Mr. Sweeney that a return need not be filed. See Sweeney Deposition at 19, Denenburg Deposition at 18. Additionally, while the IRS audit began in September 1980 for the 1978 return, the original audit only covered the corporate tax return. It was not until several months later, well past the October 15, 1980 deadline for the 1979 return, that the IRS investigation turned to the Denenburgs' personal returns. See Plaintiffs' Response to Summary Judgment at 5.

Defendant has informed this Court of the basis for its motion pursuant to Celotex Corp. v. Catrett. Thus the burden shifted to the plaintiffs "to go beyond the pleadings and by [their] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp. v. Catrett, 477 U.S. at 324, 106 S.Ct. at 2553. This they have not done. It is therefore

ORDERED that Defendant's Motion for Summary Judgment, be and is hereby, GRANTED. It is further

ORDERED that Plaintiffs' Motion for Summary Judgment, be and is hereby, DENIED.

SIGNED at Houston, Texas, on this 4th day of October, 1989.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

APPENDIX C

[ENTERED
OCT. 5, 1989]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

VICTOR D. DENENBURG and SANDRA J. DENENBURG, Plaintiffs	)	
v.	)	CIVIL ACTION NO. H-87-3547
UNITED STATES OF AMERICA, Defendant.	)	

ORDER

Pursuant to the Order signed on this date, it is ORDERED that judgment be, and hereby is, entered in favor of Defendant and against Plaintiffs. It is further

ORDERED that Defendant recover from the Plaintiffs its costs of court.

This is a FINAL JUDGMENT.

SIGNED at Houston, Texas, this 4th day of October, 1989.

Melinda Harmon
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

VICTOR D. DENENBURG and SANDRA J. DENENBURG,	)	[ENTERED JAN. 11, 1990]
Plaintiffs,	)	
v.	)	CIVIL ACTION NO. H-87-3547
UNITED STATES OF AMERICA	)	
Defendant.	)	

ORDER

Pending before the Court is the Plaintiffs' Motion for Reconsideration of its October 4, 1989, Order (Document #21). Having considered the motion, the response and the reply thereto, and the applicable law, the Court is of the opinion that plaintiffs' motion should be denied. It is therefore

ORDERED that Plaintiffs' Motion for Reconsideration, be and is hereby, DENIED.

SIGNED at Houston, Texas, on this 10th day of January, 1990.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

APPENDIX E

[FILED. JAN 30, 1991]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-2257

VICTOR D. DENENBURG and
wife, SANDRA J. DENENBURG,
Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING
(JANUARY 30, 1991)

Before GARWOOD, WIENER, Circuit Judges, and VELA*, District Judge. PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

*District Judge of the Southern District of Texas, sitting by designation.

APPENDIX F

[FILED. APR 22, 1991]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-2257

VICTOR D. DENENBURG and
wife, SANDRA J. DENENBURG,
Plaintiffs-Appellants,
versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

O R D E R :

IT IS ORDERED that appellants motion for leave to file a suggestion for rehearing en banc out of time is DENIED for lack of jurisdiction, this Court's judgment as mandate having been issued on February 11, 1991.

Jacques L. Wiener, Jr.
United States Circuit Judge